IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-530976-D1 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Armon STOVALL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1834

Armon STOVALL

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 13 May 1969, an Examiner of the United States Coast Guard at New York, N. Y., revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a messman on board SS SAN JUAN under authority of the document above captioned, Appellant:

(1) on 22 March 1966, wrongfully had marijuana in his possession while the ship was at sea; and

(2) on 28 March 1966, wrongfully had marijuana in his possession when the vessel was at Port Elizabeth, N.J.

At the hearing, Appellant was at one time represented by professional counsel who elected to withdraw. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence certain documents, testimony of some witnesses, and depositions of other witnesses.

In defense, Appellant offered no evidence.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 3 February 1970. Appeal was timely filed on 2 March 1970. Although Appellant had until 8 July 1970 to add to his original statement of grounds for appeal, he has not done so.

FINDINGS OF FACT

On all dates in question, Appellant was serving as a messman on board SS SAN JUAN and acting under authority of his document. Because of the disposition to be made of this case, no further findings of fact are required.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Because of the disposition to be made of the case, Appellant's Bases of Appeal need not be discussed.

APPEARANCE: Sullivan & Johnson, San Francisco, Cal., by Alfred G. Johnson, Esq.

OPINION

This hearing commenced on 24 July 1968 at New York. Appellant did not appear on notice. Since the Examiner had been apprized of the fact that charges based on the same matter had earlier been "remanded" (actually "dismissed") without prejudice, he perceived good reason for a delay in the proceedings in order to ascertain the contents of Decision on Appeal No. 1705. (Delay, as it later appeared, would have been necessary anyway because the Investigating Officer needed testimony which could be obtained only by deposition of absent witnesses.)

When charges have been dismissed without prejudice, either by an examiner or by the Commandant on appeal, it is not necessary for an examiner hearing the case on newly preferred charges to know of the prior action unless the issue is raised by the person himself as a defense to the new action. Nevertheless, the Examiner here, instead of treating the entire proceeding as one in absentia, by reason of Appellant's original default, directed that he be advised of the adjournment ordered to 7 August 1968.

On 30 July 1968 the hearing was resumed earlier than scheduled because Appellant had appeared in the interim. He explained on the record that his default on 24 July 1968 had occurred because he had misunderstood the date. At Appellant's request the hearing was adjourned until 1 August 1968 so that Appellant could obtain a lawyer. Also, on Appellant's request that he be permitted to sail, so long as his lawyer appeared for him, the Examiner advised Appellant that should he not appear (and there was no good reason for him not to appear, since the delay was for only two days), his attorney should be provided with some proof of his authorization to act.

On 1 August 1968, Appellant did not appear. A lawyer did. The lawyer stated that Appellant had just shipped out. Despite the Examiner's warning to Appellant that an unaccompanied lawyer should be provided with written authorization, the Examiner accepted the mere statement of the lawyer that he represented Appellant, subject to certain conditions. The Examiner brushed aside the conditional representation on the theory that conditions were a matter between attorney and client. The hearing was then adjourned until 12 August 1968.

On 12 August 1968, the attorney appeared alone and requested that he be excused from the case. It then appeared that Appellant was present in another room. Appellant made appearance on the record and the lawyer was excused. Appellant proceeded to act in his own behalf.

Certain interrogatories were settled and a postponement until 20 November 1968 was granted because Appellant was serving aboard SS PRESIDENT JACKSON which, on its round-the-world voyage, should have been back in New York by that date.

When Appellant did not appear on 20 November 1968, the Examiner noted that he was granting a delay until 27 November 1968 in the event that Appellant might appear. The record reflects nothing happening on 27 November 1968. The next resumption of proceedings was on 20 January 1969. No reference was made to the fact that nothing had occurred on 27 November 1968 and the only reference to Appellant was that he was not present. At subsequent sessions of the hearing on 24 January, 4 February, 18 March, 9 April, and 22 April 1969 reference was made each time to the fact that neither the Examiner nor the Investigating Officer had heard from Appellant.

In the Examiner's Opinion there is reference to a matter which nowhere appears in the transcript of proceedings. He says:

> "On 21 November 1968 this Hearing Examiner received a cable message from the respondent. The cable had been sent from a land station at Santiago, Chile and stated that the SS TOCOPILLA was paying off at Los Angeles on 27 December and the respondent requested a continuance to 20 January. This Hearing Examiner adjourned the hearing to 20 January 1969."

The examiner then notes that Appellant did not appear on 20 January 1969 nor at any later date.

When, where, or how "[t]his Hearing Examiner adjourned the hearing to 20 January 1969" cannot be ascertained from the transcript or from the Examiner's Opinion. Since even Appellant's

cable is not a part of the record, and since, while the Examiner acknowledges in his Opinion, as he did not do in open hearing, that he had received a communication from Appellant, there is no evidence of the Examiner's reply to Appellant, if any, there is no way of knowing whether notice was given to Appellant or not.

There is such evidence of bad faith on the part of the Appellant, who asked for the long adjournment to 20 November 1968 on the grounds that he was serving aboard PRESIDENT JACKSON on a round-the-world voyage and who then turned up on that date on another ship of another company on a different route, that had the Examiner chosen to disregard the cable and proceed in absentia again, no one could complain.

That the Examiner chose to heed Appellant's request for delay is evident. Somewhere off the record he canceled his scheduled 27 November 1968 meeting and resumed on 20 January 1969. Once having chosen to deal with the absent party, the Examiner had a duty to provide him with adequate notice.

In one of his appellant papers, Appellant declares that he asked for a postponement by cablegram, that his cable was acknowledged, that later he attempted to reach the Examiner by telephone in New York but was unsuccessful, that he called "the Coast Guard Office" and was told that he would be notified when to appear, and that he was never further notified until he learned of the outstanding order of revocation of his document in January 1970.

Here I have only Appellant's assertion which I am persuaded could have been rejected as unsupported and contradicted by a complete record. However, the incomplete record does not contradict him in any way.

The silence in the transcript as to the cablegram received on 21 November 1968, as to the omission of proceedings on 27 November 1968, and as to the lack of reference to these matters when the hearing resumed on 20 January 1969 is embarrassing. Just as embarrassing is the statement of the Examiner in his Opinion that he granted a postponement to 20 January 1969 without a showing in the record that he did grant a postponement.

As the issues appear in this case a remand to the Examiner would be required at least to fill in the gap created by his off-the-record dealings with Appellant. A remand of this case to the same Examiner is not possible because the person has become unavailable to the agency by reason of retirement. A remand to another examiner is possible but impracticable. It would necessitate the calling of the original Examiner as a witness to

explain the gap in the record or conducting a hearing de novo. Another dismissal "without prejudice" is unthinkable.

It is over four years since the Appellant's offenses took place. The offenses, possession of marijuana, merit revocation as the appropriate order. Not controlling, but influential, is the fact that in the event of a speedy revocation Appellant would have been able, a year ago, to apply for a new document. An authenticated record of service presented to me by Appellant shows that he has, since the instant offenses, served on four other vessels on seven voyages before 24 March 1967, and I am not aware that any other misconduct has occurred since that date.

I am mindful of the fact that Appellant does not appear innocent of inducing errors in this case. But to prolong this case further because of procedural errors made by Coast Guard personnel, even if induced by Appellant's own wiles, would appear to be harassment.

ORDER

The order of the Examiner dated at New York, N. Y., on 13 May 1969, is VACATED. The charges are DISMISSED.

T. R. SARGENT
Vice Admiral U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 2nd day of March 1971.

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